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In the Supreme Court of the United States

No. 632.

OCTOBER TERM, 1954.

ANN B. ROSEMAN LLOYD,

Petitioner,

vs.

ROBERT W. CAMPBELL, EXECUTOR OF THE ESTATE OF CHARLES E. ROSEMAN, JR., DECEASED; MARIA CELESTE LLOYD, A MINOR, BY RALPH STICKLE, HER GUARDIAN AD LITEM; PETER JOHN LLOYD, GUARDIAN OF THE ESTATE OF MARIA CELESTE LLOYD; THE BERKSHIRE MUSIC CENTER, THE MUSICAL ARTS ASSOCIATION, AND WESTERN RESERVE UNIVERSITY.

Respondents.

BRIEF OF RESPONDENT, MARIA CELESTE LLOYD, A MINOR, By Ralph Stickle, her Guardian ad Litem, In Opposition to Petition for Writ of Certiorari.

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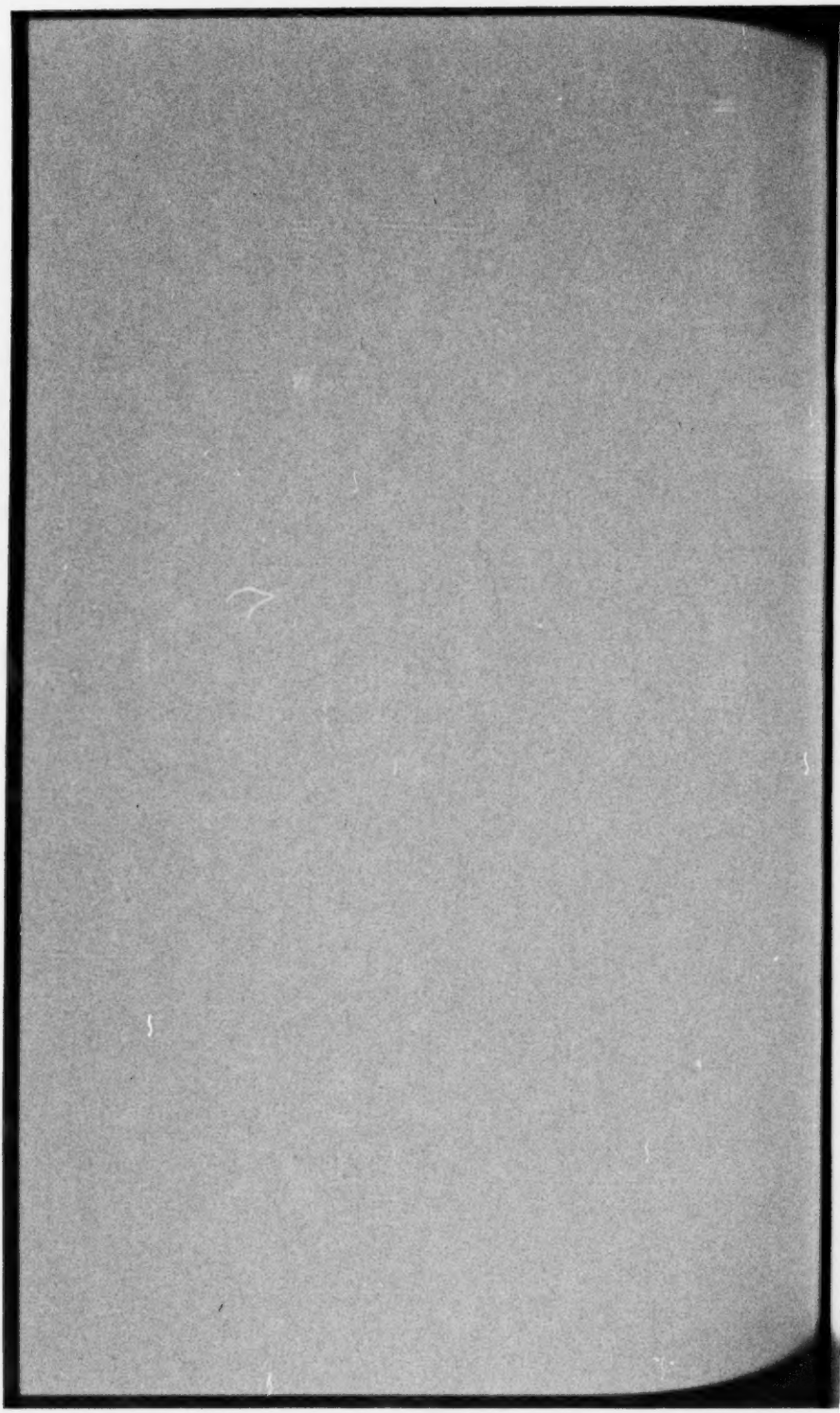

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Respondents.

BRIEF OF RESPONDENT, MARIA CELESTE LLOYD, A MINOR, By Ralph Stickle, her Guardian ad Litem, In Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

Charles E. Roseman, Jr. died testate in March, 1952, survived by a widow and infant child.

His will, executed a week before his accidental death, gave "one-half of my net estate to my said wife to be hers absolutely and in fee simple." She elected to take under the Ohio statute of descent and distribution, by virtue of the Ohio election statute which limited her to "not to exceed one-half of the net estate."

The will, after giving one-half of the net estate to the widow, made a specific bequest of stock worth $398,000 to testator's father, and gave the residue of the estate to a trustee for the benefit of his daughter, one year old at his death.

The gross estate was $2,275,323.36, and it was agreed that the taxable estate, before federal estate tax exemptions and the marital deduction, was approximately $2,100,000. The case, presented in a declaratory judgment action, is whether the widow takes her share of the estate before or after the deduction of the federal estate tax. Ohio has no statute apportioning the burden of the federal estate tax.

The Ohio Supreme Court in the instant case, *Campbell vs. Lloyd,* 162 O. S. 203, decided that the estate tax must be deducted in order to determine the net estate of the Ohio election statute. In so doing, the court specifically reversed its decision in *Miller vs. Hammond,* 156 O. S. 475; 104 N. E. (2nd) 9.

If the widow's contention had been correct, she would take outright one-half of the $2,100,000, or $1,050,000. The estate tax in such case would be about $286,000, and the testamentary beneficiaries would get $764,000. The entire estate tax would come out of the share of decedent's daughter.

Under the present decision the total estate tax is increased by about $56,000, the widow gets $879,000 and those taking under the will, $879,000.

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NO CONTROVERTED FEDERAL QUESTION INVOLVED.

The Supreme Court of Ohio construed the 1948 Revenue Act only to the extent of determining that the federal estate tax which is assessed against an Ohio estate, even where a marital deduction is involved, is primarily a debt or charge against the estate under Ohio law. This construction is not controverted, in that the petitioner makes no argument on the subject. The decision is in accord with applicable decisions of this Court.

Y. M. C. A. vs. Davis, 264 U. S. 47; *Riggs vs. Del Drago,* 317 U. S. 95.

The petitioner contends that the Revenue Act makes her share free from taxation, which we deny. But the answer to this question does not affect the decision in *Campbell vs. Lloyd.* It is the proposition that the estate tax is a debt of the estate which controls.

The case at bar covers primarily the construction of Ohio statutes relating to the right of a surviving spouse to take property against the provisions of a will.

CONSTITUTIONAL QUESTION NOT PROPERLY BEFORE THIS COURT.

The petitioner for the first time put forward the question of due process of law in her application for a rehearing, filed in the Supreme Court of Ohio. Under the court's rules such application is made without notice to the respondents and none was given. The application was dismissed. The Ohio Court never passed upon the point.

We suggest that the constitutional question was not raised in time. No such question was presented, relied upon or considered in the Ohio Courts.

Radio Station W. O. W., Inc. vs. Johnson, 326 U. S. 120; *Godchaux Co. vs. Estopinal,* 251 U. S. 179; *American*

Surety Co. vs. Baldwin, 287 U. S. 156; *Simmerman vs. Nebraska*, 116 U. S. 54.

STATUTES INVOLVED.

The Election Statute in effect at testator's death in March, 1952, Section 10504-55, General Code of Ohio reads:

> "§ 10504-55. *Election by surviving spouse.*—After the probate of the will and filing of the inventory, appraisement and schedule of debts, the probate court on the motion of the executor or administrator, or on its own motion, forthwith shall issue a citation to the surviving spouse, if any, to elect whether to take under the will or under the statute of descent and distribution. *In the event of election to take under the statute of descent and distribution, such spouse shall take not to exceed one-half of the net estate.** The election shall be made within one month after service of the citation to elect, or if no citation is issued, within nine months after the appointment of the executor or administrator, whether or not a citation be issued as herein provided. On motion filed before the expiration of such nine months and for good cause shown, the court may allow further time for the making of the election. The election shall be entered on the journal of the court. (119 v. 394; § 1; 116 v. 385; 114 v. 356. Eff. Aug. 22, 1941.)"

The italicized sentence above has been on the Ohio statute books since 1935.

The pertinent part of the Statute of Descent and Distribution, Section 10503-4, General Code of Ohio reads:

> "§ 10503-4. Statute of descent and distribution.—When a person dies intestate having title or right to any personal property, or to any real estate or in-

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* Italics throughout this brief are ours.

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heritance in this state, such personal property shall be distributed, and such real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

* * *

"2. If there be a spouse and one child, or its lineal descendants, surviving, one-half to the surviving spouse and one-half to such child or its lineal descendants, per stirpes."

* * *"

The pertinent parts of the Revenue Act of 1948 as it relates to the marital deduction are as follows:

"§ 812. Net Estate.

"For the purpose of the tax the value of the net estate shall be determined * * * by deducting from the value of the gross estate—

"(e) * * *

"(1) * * *

"(A) In general. An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse * * *."

"§ 812 (e) (1)

"(E) Valuation of interest passing to surviving spouse. In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection.

"(i) There shall be taken into account the effect which a tax imposed by this chapter, or any estate, succession, legacy, or inheritance tax, has upon the net value of the surviving spouse of such interest * * *."

CONGRESS CREATED THE MARITAL DEDUCTION TO EQUALIZE THE BURDEN ON ESTATES, AS BETWEEN COMMUNITY PROPERTY AND COMMON-LAW STATES, NOT TO FREE SURVIVING SPOUSES FROM THE PAYMENT OF TAX.

The 1948 Amendment to the Revenue Act, Section 812(e), Title 26 U. S. Code, which created the marital deduction, does not change the policy or principle that the tax primarily is an obligation of the estate.

Neither does it provide that a surviving spouse shall take his or her share tax free. On the contrary, it provides that the amount taken by the surviving spouse shall be reduced by its share of the federal estate tax levied against the whole estate, and also (in Ohio) by the inheritance tax on the spouse's share. This reduced amount is the net marital deduction allowed by the Act. The truth of this statement is made clear by the terms of Subsection 812(e)(1)(E)(i) of the Revenue Act (page 5 of brief).

The marital deduction provision was inserted in the Revenue Act in an effort to equalize the burden on decedents' estates in community property and common-law states. It is the decedent's estate, not the decedent's surviving spouse, to which the Revenue Act gives the benefit of the deduction. The deduction reduces the taxable estate, but the Act frees no one from taxation.

The idea of the marital deduction is plainly evident in this excerpt from the Senate Report, No. 1013, 80th Congress, Second Session, page 27:

> "Under the estate-tax provision of your committee's bill a *decedent spouse is allowed a marital deduction* from his gross estate in the amount of the value of all interests in property passing outright from the decedent to the surviving spouse by way of bequest, devise, transfer, right of survivorship in jointly held property, etc. The deduction is limited to an amount

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not in excess of 50 percent of the adjusted gross estate."

After the decedent's estate has been reduced by this deduction, the tax on the remaining taxable estate is a charge against the estate as a whole. The Supreme Court of Ohio decided that this tax must be deducted from the estate, in order to determine the *net estate* of which, under Ohio's election statute, the petitioner could take not more than one-half. Conversely, the statute which limits a dissatisfied spouse to one-half of the net estate, gives the testamentary beneficiaries at least one-half of the estate.

It would not be an even division of the Roseman estate for the widow to get $1,050,000 of the distributable estate, and the testamentary beneficiaries $764,000. This is what the petitioner asks.

ESSENTIALLY, THE SUPREME COURT OF OHIO DECIDED ONE QUESTION ONLY: THAT THE ESTATE TAX UNDER THE 1948 REVENUE ACT IS A DEBT OF THE OHIO ESTATE, AND AS SUCH MUST BE DEDUCTED IN COMPUTING THE "NET ESTATE" OF THE OHIO ELECTION STATUTE.

Assuming that the 1948 Act, as petitioner erroneously asserts, permits a surviving spouse to take the gross share of the estate which goes to her, free of federal estate tax, the decision in *Campbell vs. Lloyd* still would be correct.

In *Riggs vs. Del Drago,* 317 U. S. 95, decided in 1942, this Court said:

> "The intent of Congress was that *the federal estate tax should be paid out of the estate as a whole,* and that the distribution of the remaining estate and ultimate impact of the federal tax should be determined under the state law. * * *

> "The fact that the ultimate incidents of the federal estate tax is thus governed by state law does not violate the constitutional requirement of geographical uniformity in federal taxation."

After all deductions, including marital, the tax imposed on the remaining estate by the 1948 Revenue Act still is charged to and paid out of the estate as a whole. The rights of the dissatisfied spouse still are determined by the Ohio legislature. Ohio has no statute providing for apportionment of the burden of the tax. The state courts have no right to "equitably apportion" the burden, for to do so would be to tamper with the "net estate" of the Ohio statute.

On the contrary the Supreme Court of Ohio reaffirmed its previous decisions that the estate tax is a debt or obligation of the estate to be paid out of the estate. To this extent only did the court construe the Revenue Act. The previous decisions on the subject are:

Tax Commission vs. Lamprecht, 107 O. S. 535; *Davidson vs. Miners and Mechanics Savings and Trust Co.*, 129 O. S. 418; 98 A. L. R. 1318 and *Y. M. C. A. vs. Davis*, 106 O. S. 366.

This Court affirmed the decision of the Supreme Court of Ohio in the last case above, in *Y. M. C. A. vs. Davis*, 264 U. S. 47, in which the situation is analogous to that in *Campbell vs. Lloyd.* An Ohio testatrix who left no provision for the payment of federal estate tax, made certain specific bequests and gave her residuary estate to four charities. The amount of their gifts was deductible in the computation of the taxable estate, but the estate tax was held to be payable out of the residuary estate. Under Ohio law the specific legacies were payable in full unless the testatrix directed otherwise.

Said Chief Justice Taft:

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"It must be presumed * * * that it was her (the testatrix's) purpose that the residuary legatees were to receive all that was left *after paying all charges, including this tax,* out of her estate."

So in the instant case, after the exemptions and the deductions, including the marital deduction, there still was an estate tax to be paid out of the estate. This tax must be deducted to compute the net estate.

The Courts of Maryland, North Carolina, Illinois and Wisconsin with statutes similar to Ohio's and with the same question before them, have arrived at the same answer as that of the Ohio court.

Weinberg vs. Safe Deposit Co. (1951), 198 Md. 539; 85 A. (2nd) 50; *Wachovia Bank vs. Green* (1953), 236 N. C. 654; 73 S. E. (2nd) 879; *Northern Trust Co. vs. Wilson* (1951), 344 Ill. App. 508; 101 N. E. (2nd) 604; *In re Uihleins' Will* (1953), 264 Wis. 362; 59 N. W. (2nd) 641.

We find only one case in the United States which is at variance with the above decisions. That case is *Lincoln Bank vs. Huber* (1951) (Ky.), 240 S. W. (2nd) 89, in which there was no contest. The heirs were united in wishing a decision which would reduce the total estate tax.

The Kentucky court said that it had:

"developed and maintained a rule of 'equitable apportionment' relative to imposition of the federal estate tax, and that under this rule the widow's share in the present case should not bear any portion of the estate tax."

There are some thirteen states which have statutes apportioning the burden of the tax, based generally on the proportionate share received, after making allowance

for property which does not add to the tax. Obviously, such states do not handle the marital deduction question as it is handled in states which have no such statutes. But there is no confusion over the *Campbell vs. Lloyd* decision. It is in line with the decision of all courts in which there has been a controversy, and in which similar statutes obtain.

CONGRESS DOES NOT CONTROL THE DEVOLUTION OF PROPERTY IN THE STATES.

Congress could have said, but did not say, that the property taken by a surviving spouse should pay no estate tax. By so doing, Congress might have increased the net marital deduction, thus reducing the total tax. But Congress could not award any property whatever to the surviving spouse.

Congress does not control the devolution of property in Ohio. The right to transmit and inherit property is not a natural and inherent right. It is a right which must be conferred by the legislative power.

Magoun vs. Trust Co., 170 U. S. 283.

The Supreme Court of Ohio has recognized this principle: *Ostrander vs. Preece*, 129 O. S. 625; *Gilpin vs. Williams*, 25 O. S. 283 and *State, ex rel. vs. Guilbert*, 70 O. S. 229.

In the case at bar the Court decided that it would be violating a property right, given by the election statute, if it fastened the burden of the estate tax on the trust created for the benefit of decedent's infant daughter, that is, if it engaged in so-called equitable apportionment.

The widow, strictly speaking, does not pay any of the estate tax. Under Ohio law her share of the net or distributable estate is diminished by the payment of the tax.

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To apply to our situation the language of Chief Justice Taft in *Y. M. C. A. vs. Davis,* 264 U. S. 51, where deductible charitable bequests were involved:

> "It is hardly true to say that the share taken by the spouse is taxed. Her share is reduced by the payment of debts of the decedent, costs of administration and taxes. She does not pay the taxes any more than she pays the funeral expenses."

THERE IS NO VESTED RIGHT IN THE DECISION OF A COURT.

The fact that a state court has changed its decision does not deprive one of property without due process of law. Such a decision, in effect, declares that the former decision never was law. There is no vested right in the decision of a court.

This principle has been announced by this Court repeatedly.

Tidal Oil Co. vs. Flanagan, 263 U. S. 444; *Fleming vs. Fleming,* 264 U. S. 29; *Brinkerhoff-Faris Trust Co. vs. Hill,* 281 U. S. 673; *O'Neil vs. Northern Colorado Irrigation Co.,* 242 U. S. 20; Vol. 12 *Am. Jur.* Constitutional Law, Paragraph 398.

Even if the decision of a state court erroneously reverses a previous correct decision, no question of violation of the Fourteenth Amendment is presented.

Patterson vs. Colorado, ex rel., 205 U. S. 454; *Great Northern Railway Co. vs. Sunburst Oil and Refining Co.,* 287 U. S. 358.

The theory that a statute was one law when first construed, and has become a new law by the reversal of the original decision is unsound. *Fleming vs. Fleming,* 264 U. S. 31-32.

The petitioner had no property right in the *Miller vs. Hammond* decision. By her election against the will, she merely had an expectation or hope that she would get more than the one-half of the net estate which the will gave, this despite the fact that by Ohio statute she could take no more than one-half of the net estate. The will is silent as to the payment of taxes, so she relinquished nothing by her election.

CONCLUSION.

The decision of the Supreme Court of Ohio construes Section 812(e), Title 26, U. S. Code, in only one essential respect, to-wit, that the estate tax as actually assessed is a charge against the estate in administration. This construction is correct, and it is not argued by the petitioner.

The Ohio Court further decided that a dissatisfied spouse, entitled to one-half of the estate under the Ohio statute of descent and distribution, but limited by the Ohio election statute to one-half of the *net estate*, takes her half, after deduction of the federal estate tax. This decision is sound and it accords with the decisions in every state where this question has been in controversy.

Congress did not free the share of a surviving spouse from taxation, but if it had done so, the estate tax which is levied still would be the obligation of the estate, unless the burden is shifted by the will or the statutes of the state.

The constitutional question on due process of law was not raised in time. It was never considered or passed upon by the Ohio courts.

But even if the presentation were timely, there is no merit in the claim. The petitioner lost no property right by reason of the reversed decision on the construction of

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Ohio statutes. She never had any property right in the reversed decision.

Respectfully submitted,

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